occupied until the present day by the respondent, his wife and children. The respondent Perumal was a rubber tapper who, during his employment by the appellants, was allowed occupation of the house in question rent free. On May 22, 1970 he was dismissed. His wife, Thanapakiam, also a rubber tapper was dismissed on the same date — a practice followed by the appellants in accordance with the provisions of section 17 of the Employment Ordinance No. 38 of 1955. The appellants' estate manager, Mr. Kurup, stated in his affidavit of March 7, 1972 that Thanapakiam, being then in the family way, was re-employed on compassionate grounds. She ceased work upon her confinement on December 18, 1970 and it was a fact alleged expressly by the appellants and not controverted either by her or her husband that since December 18, 1970 she had never reported for duty. On February 7, 1971 she was duly paid her maternity allowance.

On February 21, 1972 the appellants moved the High Court at Seremban for an order that Perumal and all persons holding through or under him may be restrained until the trial of the action from remaining in the appellants' house. Both husband and wife filed affidavits to the effect that the wife had never been dismissed and that consequently she was and is entitled as of right to remain in occupation of the premises. The learned judge in dismissing the application said: —

"Since Thanapakiam is a tenant of the house in her own right as an employee of the Estate, I am of the view that she should have been joined as a co-defendant in this action, and in order that the application can be properly considered on its merits, as the second respondent in the motion before this court. The application is therefore premature, to say the least."

In coming to that conclusion I am afraid that certain facts had been overlooked altogether. First, there was an inquiry held under section 16A of the Industrial Relations Act 1967 into the complaint by both Perumal and Thanapakiam of wrongful dismissal. The complaint was dismissed by the Minister: see letter dated August 2, 1971, annexed to the affidavit of Mr. Kurup, sworn on March 3, 1972. Secondly, Mr. Kurup's affidavit of March 10, 1972 contains a specific statement of fact that Thanapakiam never applied for re-engagement or reported for duty after she ceased work on December 18, 1970. This was not challenged or contradicted. Under the circumstances the law is clear. Section 15(2) of the Employment Ordinance 1955 provides: —

"(2) A labourer shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days —

(a) without prior leave from his employer or without reasonable excuse; or

(b) without informing or attempting to inform his employer of the excuse for such absence."

I do not think it can be seriously argued that neither the respondent nor his wife has any shadow of a right to claim that they are still in the employment of the appellants. It is moreover, a fact deposed to in the affidavit of Mr. Kurup dated March 7, 1972, that the respondent has now been gainfully employed by Seng Lee Plywood Sdn. Bhd. at their factory situate on the 5th mile, Tampin-Seremban Road. He cannot be employed concurrently by this factory and by the appellants. I do not see why his wife should be made a party merely for the purpose of an inquiry into a fact which she certainly cannot challenge.

I would accordingly allow this appeal with costs, and make the order on the appellants' motion as prayed.

Gill and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Karam Singh Veriah & Co.*

AMMAN SINGH v. VASUDEVAN

[O.C.J. (Mohammed Azmi J.) November 30, 1972]

[Kuala Lumpur — Civil Suit No. 1567 of 1969]

Contract — Object of contract to defraud creditors — Winding up of company — Money paid — Whether consideration lawful — Whether contract enforceable — Contracts (Malay States) Ordinance, 1950, ss. 24, 77, and 78.

Moneylenders — Whether contract for advance of money was a moneylending transaction — Whether plaintiff moneylender — Statutory presumption — Whether rebutted — Moneylenders Ordinance, 1951, s. 3.

In this case the plaintiff had advanced the sum of $10,000 to a company of which the defendant was the managing director in consideration of which the defendant agreed to pay him twenty cents on every ton of timber and other produce extracted from certain forest lands, of which the company were sublicensees. Subsequently, a petition was presented for the winding-up of the company. Thereupon an agreement was entered into whereby in consideration of the plaintiff's undertaking not to support the creditors' petition for winding-up, the defendant undertook to pay the plaintiff the sum of $10,000 which had been loaned to the company.

When the petition came up for hearing, counsel who appeared for the plaintiff opposed the petition. The defendant then gave the plaintiff a cheque for $5,000 as part payment of the sum of $10,000. This was dishonoured and the plaintiff then sued the defendant for breach of contract. The defendant alleged *inter alia* (a) that the original agreement between the company and the plaintiff was a moneylending transaction and as the plaintiff had not complied with the provisions of the Moneylenders Ordinance, the agreement was unenforceable; (b) that the agreement between the plaintiff and the defendant was illegal and immoral on the ground of interfering with the course of justice. It was also argued on behalf of the plaintiff that the agreement by the defendant was a contract of indemnity.

Held: (1) the legality or otherwise of the agreement between the plaintiff and the company was not the main issue in this case and in any event on the facts, the statutory presumption that the plaintiff was a moneylender had been rebutted;

(2) as the agreement between the plaintiff and the defendant in this case was an attempt to defraud the other creditors in the winding-up petition, it was void, as the consideration for it was unlawful. The agreement was therefore unenforceable at the instance of the plaintiff;

(3) the contract between the plaintiff and the defendant was not a contract of indemnity but, even if it was, there was no evidence to show that the company had refused to make repayment upon proper notice of demand, and therefore there was nothing for the defendant to indemnify the plaintiff.

Case referred to:-

(1) *Elliott* v. *Richardson and others* (1870) L.R. 5 C.P. 744.

CIVIL SUIT.

L. H. Singh for the plaintiff.

R. K. Nathan for the defendant.

Mohamed Azmi J.: In this suit, the plaintiff claims the sum of $10,000 for breach of a contract made between him and the defendant on June 18, 1969. The facts of the case may be summarised as follows. Some time in the month of October 1968 the Eastern Timber Sdn. Bhd. (hereinafter referred to as "the company"), of which the defendant was the managing director at all relevant times, was granted a sub-licence by one Lee Fan Soong to fell and remove timber and other produce from an area of 13,500 acres of forest land situate in the Mukim of Temmenga in the State of Perak. To enable the company to exercise the timber rights, it entered into an agreement with the plaintiff on March 25, 1969 (hereinafter referred to as "the March 1969 Agreement"), under which the plaintiff advanced to the company the sum of $10,000 in consideration of which the company agreed to pay him twenty cents on every ton of timber and other produce extracted from the said land. Some time in May 1969, the plaintiff read in the newspaper an advertisement regarding a creditors' petition for the winding up of the company. The petition was presented at High Court Ipoh on May 27, 1969 by Lee Fan Soong, the sub-licensor, vide Winding Up Petition No. 1 of 1969, and it was fixed for hearing on July 14 the same year. It was in-between the date of advertisement in the newspaper and the date of hearing of the petition that the agreement, which is the subject-matter of the present suit, was drafted by Mr. Thayalan, the plaintiff's solicitor. By the said agreement (hereinafter referred to as "the June 1969 Agreement") in consideration of the plaintiff's undertaking not to support the creditors' petition to be heard on July 14, 1969, the defendant undertook to pay the plaintiff the sum of $10,000 on or before August 30, 1969. When the petition came up for hearing, Mr. Thayalan who appeared for the plaintiff opposed the petition, and on the same day after the hearing, the defendant issued to the plaintiff a cheque for the sum of $5,000 post-dated to August 14, 1969 as part payment of the sum of $10,000. On the due date, the cheque was presented for payment but it was returned dishonoured and marked "Refer to drawer". Since the defendant has failed or neglected to pay the sum of $10,000, the plaintiff alleges that he is in breach of the June 1969 Agreement, as a result of which the plaintiff has suffered damages.

In his defence, the defendant's contention is that the March 1969 Agreement whereby the plaintiff advanced the sum of $10,000 to the company "free of interest" is basically a moneylending transaction and as such it is illegal because the plaintiff is not a licensed moneylender and he has not complied with the provisions of the Moneylenders Ordinance. The defence contends that the twenty cents per ton of forest produce payable to the defendant is in fact interest on the so-called free of interest loan. Further, since the plaintiff lent the money to the company in consideration of a larger sum being repaid, the presumption under section 3 of the Moneylenders Ordinance, 1951 would arise and that the plaintiff has not rebutted the presumption that he is a moneylender. In my view, the legality or otherwise of the March 1969 Agreement between the plaintiff and the company is not the main issue. The plaintiff's cause of action is based on the June 1969 Agreement, and the question which I have to determine is whether the undertaking given by the defendant to pay the plaintiff $10,000 on or before August 30, 1969 is a valid agreement enforceable at the instance of the plaintiff. The March 1969 Agreement is only relevant to the extent that it explains the circumstances which led to the undertaking given by the defendant to the plaintiff on June 18, 1969. Be that as it may, having considered the March 1969 Agreement and the evidence adduced in this case, I find there is insufficient evidence to prove any degree of system and/or continuity in moneylending transactions so as to bring the plaintiff within the meaning of "moneylender" under the Moneylenders Ordinance, 1951. The plaintiff is a graduate from the University of Malaya and is employed by the Royal Insurance Company Limited in Kuala Lumpur. I accept his testimony that, apart from this loan of $10,000 to the company, he had not entered into any moneylending transaction with anybody else except on one or two occasions where he lent $50 to friends with no interest. In his evidence, the defendant alleged that, as in the case of the plaintiff, other people like Mrs. Prem Singh, Mr. Sadhu Singh and Mr. Sarab Singh had advanced money to the company and had executed similar loan agreements. I cannot accept this piece of evidence as it was neither put to the plaintiff in cross-examination nor was any of the three persons named called to give evidence. In any event, the fact that other people had lent money to the company does not make the plaintiff a moneylender. As regards section 3 of the Ordinance, in view of my finding that the plaintiff's business is not that of moneylending, and that he has not carried on or advertised or announced himself or held himself out in any way as carrying on the business of moneylending, the statutory presumption that the plaintiff is a moneylender has sufficiently been rebutted. The fact that the plaintiff has admitted in evidence that the loan to the company was in the form of investment where he would suffer no risk or loss does not alter the position, because whatever the plaintiff might say, it cannot be denied that any person giving a loan to a company must necessarily take risk should there be failure in the business of the company.

As stated earlier on, the real issue for determination is whether the undertaking by the defendant under the June 1969 Agreement is legally enforceable bearing in mind that the real purpose or intention of the agreement is to enable the defendant as a managing director on the one hand to save the company from being wound up, and to enable the plaintiff on the other hand to recover from the defendant personally the sum of $10,000 which he has advanced to the company under the March 1969 Agreement. The June 1969 Agreement is in the following terms:

"Indemnity Agreement

I, A. Vasudevan of No. 6, Edgar Lane, Ipoh, in consideration of the undertaking given by Amman Singh of No. 84, Strachan Road, Sentul, Kuala Lumpur, not to support the creditors petition in respect of Eastern Timber Sdn. Berhad, to be heard on the 14th day of July 1969, hereby undertake

to pay the said Amman Singh on or before the 30th day August 1969 the sum of Ten Thousand Dollars ($10,000) which he is entitled to under the agreement made between the Eastern Timber Sdn. Bhd. and the said Amman Singh on the 25th day of March 1969.

Sd.

Signature: .....
(A. Vasudevan)
Sd.

Signature of Witness: .....
(Ramanathan)"

It is pleaded by the defence that the June 1969 Agreement is illegal and immoral on the ground of interfering with the course of justice. It is submitted that because the agreement is an illegal one Mr. Nathan, counsel for the defendant, contends that the plaintiff is relying on an illegality to enforce his claim. I think, for the purpose of determining the enforceability of the June 1969 Agreement, it is relevant to consider whether the consideration or object of the agreement is lawful. Section 24 of the Contracts (Malay States) Ordinance, 1950 (which is in *pari materia* with section 23 of the Indian Contract Act) provides as follows:

"The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by law; or

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or

(c) it is fraudulent; or

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

In this case, the June 1969 Agreement was not signed by the plaintiff but was only executed by the defendant and witnessed by Mr. Ramanathan (PW5). The consideration given by the plaintiff is that he would not support the creditors' petition to wind up the company. When the petition came up for hearing on July 14, 1969, the plaintiff through his counsel Mr. Thayalan did oppose the petition, and it cannot be denied that this was done, not for any good cause that the company should not be wound up, but because of the undertaking given by the defendant to pay the plaintiff $10,000 which the plaintiff is entitled to under the March 1969 Agreement made between him and the company. To my mind, such consideration is unlawful as it amounts to a fraud against other creditors of the company. In my view, the agreement — by whatever name called — is an attempt by the plaintiff to defraud the other creditors in the winding up petition. The plaintiff is not a secured creditor and as admitted by Mr. Thayalan there were about five creditors in the winding up petition and the composition of creditors must be to the knowledge of all creditors. He also admitted that the so-called indemnity agreement was drawn up on the instruction of both the company and the plaintiff and that all the fees were to be borne by the company. Although the company and the defendant have distinct legal entity, it is clear that the defendant executed the June 1969 Agreement for the benefit of the company, *i.e.* in order to save the company from liquidation. Further, the agreement should be regarded as an act opposed to public policy. One of the group of cases where the courts have refused to enforce agreements as being against public policy is where its objects interfered with the proper workings of the machinery of justice. (*Chitty* on Contract 23rd Edition page 373 paragraphs 803 and 804). Again, *Chitty* on page 386 paragraph 831 citing the case of *Elliott* v. *Richardson & Ors.*[1] has this to say:

"An agreement by a shareholder in a company which is being compulsorily wound up that, in consideration of a sum of money, he would endeavour to postpone the making of a call or would support the claim of a creditor is unenforceable as being contrary to the policy of the Companies Acts and perhaps also an interference with the course of public justice."

Although in the instant case, the plaintiff is not a shareholder of the company, in my judgment, the same principle should apply where he is a creditor of the company. When the agreement was made, it was without the knowledge of the other creditors and the court. Since the consideration is unlawful, the agreement is void under section 24 of the Contracts (Malay States) Ordinance. It is therefore unenforceable at the instance of the plaintiff.

It has been argued that the written undertaking of the defendant is a contract of indemnity under which the defendant undertook to indemnify the plaintiff for the sum of $10,000 and that the defendant has failed to indemnify the plaintiff on or before August 30, 1969. Section 77 of the Contracts (Malay States) Ordinance defines what a contract of indemnity is, and section 78 provides the rights of the indemnity holder when he is sued, against the promissor. In my view, the facts of the present case do not constitute a contract of indemnity. The company is still legally in existence and there is no evidence that the plaintiff has suffered loss for which he is entitled to be indemnified. It should be noted that the sum which the defendant promised to pay is the $10,000 which the plaintiff is entitled under the March 1969 Agreement made between him and the company. Under clause 2 of the March 1969 Agreement, the plaintiff is only entitled to the repayment of $10,000 upon him giving the company four months' notice in writing demanding the same. There is no evidence that such notice of demand has been given to the company and, as such, it cannot be said that the plaintiff is presently entitled to the money. Thus, even if the undertaking by the defendant can be construed as a contract of indemnity, unless the company has refused to make repayment upon proper notice of demand, there is nothing for the defendant to indemnify the plaintiff. To indemnify is to make good a loss which one person has suffered in consequence of the act or default of another. Since the unlawful consideration given by the plaintiff is his right to support the creditors' petition, it does not lie in his mouth to say now that, as a result of adhering to his undertaking, he has lost his opportunity to support the petition for the winding up of the company.

The plaintiff has advanced $10,000 to the company under the March 1969 Agreement. The present claim is clearly an attempt on his part to get his

money back based on the so-called indemnity agreement of June 8, 1969. When the solvency of the company became suspect with the filing of the winding up petition by one of the company's creditors, the plaintiff not unnaturally was anxious as to the fate of his unsecured loan. He immediately jumped the gun by entering into the June 1969 Agreement with the defendant who was then the managing director of the company. It is interesting to note that, although the defendant undertook to pay the plaintiff on or before August 30, 1969, he was literally forced to issue a cheque for $5,000 in favour of the plaintiff post-dated to July 14, 1969. The defendant is not a man of means and from the unchallenged evidence of Mr. Ramanathan, when the defendant signed the undertaking he was not in fact in a financial position to pay the plaintiff $10,000 by August 30, 1969. Mr. Thayalan who drew up the June 1969 Agreement must have known that the so-called indemnity agreement was a worthless piece of document, and I can only infer that that was the very reason why the defendant was pressured to issue a cheque for $5,000 payable before the due date as part payment of the sum of $10.000. In this case, the plaintiff has not sued the defendant on the dishonoured cheque in the alternative as a separate cause of action. From the evidence, the plaintiff's remedy, if any, for the recovery of his $10,000 must necessarily be confined to the March 1969 Agreement which is still valid and enforceable. For whatever it is worth, he can still demand from the company for the return of his money, or alternatively he may perhaps sue the defendant on the $5,000 cheque.

Under the circumstances, I would dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *L. H. Singh & Co.; R. K. Nathan & Co.*

TAN KIM KUAN v. LIEW YEW SANG

[A.C.J. (Suffian F.J.) January 24, 1973]

[Kuala Lumpur — Civil Appeal No. 36 of 1971]

Landlord and Tenant — Tenant receiving letter from new owner's solicitors warning him not to pay rent to landlord — Whether justified in not paying rent to landlord — When tenant estopped from denying landlord's title — Evidence Ordinance, 1950, s. 116.

The appellant had obtained a warrant of distress for rent against the respondent. The respondent applied to have the warrant set aside. He alleged that he had received a letter from the new owners of the land warning him not to pay rent to the appellant. The learned President of the Sessions Court set aside the warrant of distress and the appellant appealed.

Held: (1) for so long as he remains in possession the tenant may not deny the title of his landlord at the beginning of the tenancy. If he wishes to deny his landlord's title at the beginning of the tenancy he must first surrender possession. But without surrendering possession the tenant may say that his landlord's title has since the beginning of the tenancy come to an end; or that he (the tenant) has been evicted by a paramount title holder; or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he has as a result of such a threat attorned to the paramount holder;

(2) in this case all that the respondent had alleged was that he had received a letter from the new owner's solicitors warning him not to pay rent to the landlord. This was not sufficient to establish that the landlord's title had come to an end and in the circumstances the learned President was wrong in setting aside the warrant of distress.

Cases referred to:-

(1) *Hirabai* v. *Palode* A.I.R. 1955 Nagpur 234.

(2) *Farngu* v. *Ram* A.I.R. 1959 Punjab 564.

(3) *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156.

(4) *Ong Choon* v. *Chow Mee* K.L. Civil Appeal No. 16 of 1968, unreported.

(5) *Bhaiganti Bewa* v. *Himmat* A.I.R. 1917 Cal. 498.

(6) *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh* A.I.R. 1915 P.C. 96.

(7) *Nadar* v. *Ranganathan* A.I.R. 1954 Mad 402.

(8) *Annamalai Chettiar* v. *Molaiyan* A.I.R. 1970 57 Mad 396, 397.

(9) *Muthu Nayan* v. *Sinna Sama Vaiyan* (1905) I.L.R. 28 Madras 526.

CIVIL APPEAL.

T. Selvarasan for the appellant.

C. M. Wong for the respondent.

Suffian F.J.: Tan Kim Kuan, landlord, applicant in the lower court and appellant before me, was owed 12 months' rent totalling $720 by his tenant Liew Yew Sang, respondent both in the lower court and before me. The landlord obtained a warrant of distress against him. The tenant applied for the warrant to be set aside. The learned president set it aside, and the landlord appeals to this court.

The facts very briefly are as follows. The premises concerned is a temporary building known as No. 102, 4½ mile, Ipoh Road, Kuala Lumpur. It stands on part of land which originally belonged to Jamiah binti Haji Abdul Rahim. After her death the land was bought by Sharikat Bakti Ltd. Apparently there were other buildings erected on the land. The new owners of the land, claiming that owners of the buildings were trespassers, sent a letter to all of them saying that they were in unlawful occupation, that certain persons were collecting rent from persons occupying the buildings, that they had no authority to do so, that paying rent to them would not give a right to occupy the buildings, and that only Sharikat Bakti Ltd. had authority to permit the occupants to remain in occupation. This letter was dated 10th January, 1966. The landlord-appellant claims that he never received this letter, but I do not think this important. The tenant-respondent did receive this letter, and as a result he stopped paying rent to the landlord. He did not pay rent for the whole of 1966 and it was in respect of these arrears that the landlord obtained a warrant of distress.

It is a fact that the new owners of the land, Sharikat Bakti Ltd., brought action in the High Court against some of the owners of the buildings, but not against this landlord-appellant, and in four of them succeeded in persuading the court to declare that the owners were trespassers and to restrain them from